



**Mwaniki v Ultimate Security Services Limited & another (Cause
857 of 2017) [2023] KEELRC 178 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 178 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 857 OF 2017
J RIKA, J
JANUARY 31, 2023**

BETWEEN

SIMON MAINA MWANIKI CLAIMANT

AND

ULTIMATE SECURITY SERVICES LIMITED 1ST RESPONDENT

SECURITY GUARDS SERVICES LIMITED 2ND RESPONDENT

JUDGMENT

1. The claimant filed his statement of claim on May 22, 2017.
2. He states that he was employed by the 2nd respondent, an affiliate of the 1st respondent, as a security guard.
3. On June 10, 2014, at around 12.30 am a client of the respondents raised a security alarm, which was received by the 1st respondent's control room.
4. The claimant, in the company of the respondents' driver, was sent to the scene to investigate the incident.
5. They arrived at the scene at 1.00 am. They were confronted by gangsters who were armed with guns. They were fired at. The claimant's colleagues were able to escape, but the claimant was not. He called the control room for back-up. He was spotted by one of the gangsters, who beat him thoroughly, leaving him with severe injuries.
6. He blames the respondents for: not providing him with adequate protective clothing and equipment, including a helmet, body armour, security guard baton, flashlight, stab-proof or ballistic vest; failure to supply the claimant with a safe work system; failure to respond to the claimant's call for back-up; and failure to provide the claimant with adequate training.



7. He sustained fracture of the anterior wall of maxillary antra with hemosinus; nasal cavity hematomas; and left orbital radiopaque foreign body.
8. He pleads special damages at Kshs 20,665 which include the costs of medical drugs, and travel to hospital on various dates.
9. He prays for general damages, costs, and interest.
10. The respondents filed their statement of response on January 8, 2017. They concede that the claimant was their employee. They at all material times took all reasonable precautions, in assigning the claimant guard duties. They maintained a safe working environment. They deny that they were in any way negligent. If any accident occurred, it was on account of the claimant's negligence. He failed to have regard for his own safety; he failed to take reasonable precaution; he disregarded standing instructions issued to him by the respondents; he exposed himself to the risk of injury; he acted recklessly and negligently; and failed to wear safety gear provided by the respondents. The claim is without merit.
11. Both parties concede the jurisdiction of the court.
12. The claimant gave evidence on June 22, 2022, as did respondents' witness Peter Nyamweya Mose, a colleague of the claimant. The claim was last mentioned on November 2, 2022, when parties confirmed filing and exchange of their closing submissions.
13. The claimant restated the contents of his statement of claim in his evidence. He explained that the respondents are sister companies. The 1st respondent does not have security guards. It deals with security alarms, and procures guards from the 2nd respondent. The claimant was sent with a colleague to answer to an alarm raised by the respondent's client around midnight. They came to a dead end with no space to turn. He came out of the car and ran. He called the control room. The robbers pursued him, and cornered him. They beat him up. His colleagues had disappeared. He suffered injuries on the ears. He was saved from further harm by the helmet he was wearing. The helmet however cut him as he was being beaten. His main injury was on the nose. He was sent to Kenyatta Hospital for treatment by the respondents where he was treated. He adopted his documents on record as exhibits, except the medical report, dated April 28, 2017 which was omitted upon the objection made by the respondents' advocate.
14. On cross-examination, he told the court that he did not have the employment contract in court. The car in which he travelled to the scene, belonged to the 1st respondent. He was employed by the 2nd respondent. The respondents are sister companies. He wore a helmet, which saved his life. His injuries have not healed completely. He resigned afterwards, voluntarily. He underwent training for 30 days before employment. He worked for 3 years. He could not run away from the gangsters, like his colleagues did. He was not paid workmen compensation. The respondents were aware that the claimant was in danger.
15. Peter Nyamweya Mose adopted his statement of witness and documents filed by the respondents. He told the court that the guards received training of 30 days on recruitment. They were trained on drill and other security issues. They were trained on security response. They were provided gown, helmet and rungu. On cross-examination, Mose told the court that he was employed by 2nd respondent, and that the 1st respondent is a sister company of the 2nd respondent. He was not aware that the employer called in the police at the scene. He heard gunshots. The claimant was at the backseat. Mose was not aware that the claimant called the control room for backup. Mose came to learn later, after police officers were called, that the claimant was seriously injured. He was injured on the leg and nose. The claimant's helmet was cracked. He just informed the office that the team was in danger. He exposed



himself to danger. The team had gone to the scene to assess if the client was in danger. Redirected, Mose told the Court that the office was aware of the alarm.

16. The issues are whether the claimant has established that he suffered injuries as a result of the respondents' negligence; whether he merits general damages, and the quantum of that damages; and whether he is entitled to special damages.

The Court Finds:

17. There is common evidence from the 2 Witnesses that the respondents are sister companies. The 1st respondent deals with security alarms, while the 2nd provides security guards to the 1st respondent.
18. The claimant and the respondent's Witness Mose, were employed by the 2nd respondent as security guards. They were on duty, at midnight on or about June 10, 2014, when an alarm was raised by the 1st respondent's client.
19. It is not in dispute that the claimant and his colleagues were assigned the role of answering to the alarm. They proceeded to the scene, where they were confronted by gun-wielding robbers. Their vehicle came to a cul-de-sac. The claimant's colleagues were able to take to their heels, to escape from the gangsters. The claimant was not able to run, and made an attempt at calling for back-up from the control room. He was spotted by the robbers, who attacked him, beating him severely. They cracked his helmet. This evidence is common to the parties.
20. There was some disagreement on the nature of injuries sustained by the claimant. His evidence was that he was injured on the ear. He also told the court that his main injury was on the nose. Upon objection from the Advocate for the respondents, the claimant opted not to exhibit document 2, which is a medical report dated April 28, 2017, compiled by Dr AK Mwaura.
21. But this is not fatal to the claim. There is on record other medical documents to support the claim, and the evidence by the respondent's Witness, corroborates the claimant's evidence on the injuries sustained. Mose told the court that the claimant was seriously injured on the nose and the leg. He confirmed that the gangsters cracked the claimant's helmet, in the process of beating him. There are medical records from various hospitals admitted in evidence, which authenticate the nature of injuries sustained. The radiological report dated June 11, 2014 from Kenyatta Hospital supports the details of injuries given at paragraph 9 of the statement of claim.
22. On negligence, it is clear that the respondents did not provide a safe working environment to the claimant. He was issued a helmet, a baton and a gown, to confront armed gangsters. The degree of care imposed by law on the respondents, ought to have been commensurate with the degree of exposure the claimant and the other guards were exposed to. Gun-toting robbers were not to be restrained by security guards armed with nothing more than batons. Why for instance was there no provision for bullet-proof vests?
23. It was preposterous for the respondents to assign the claimant and his colleagues the task of visiting the client, "to assess if the client was in danger." This was the evidence adduced by Mose, on cross-examination, in explaining the purpose of their visit to the scene of the crime. The client had raised an alarm, and the respondents ought to have known, that the client was in danger, without sending the guards on a confirmatory and suicidal mission.
24. The respondents are security firms, and are expected to provide their guards, with safe working conditions, as has been pronounced in a catena of judicial authorities, such as *Oluoch Eric Gogo v Universal Corporation Limited* [2015] e-KLR; and *Wilson & Clyde Coal Co v English* [1938] AC 579.



25. The respondents were aware of the risks the claimant was exposed to. He called the control room while under attack. There was no response or immediate intervention by the respondents or the police. The respondents did not give evidence to show that they took measures, to summon immediate assistance to the claimant, when a violent situation occurred. There was nothing done, to eliminate or reduce the risk, which to a reasonable man was a foreseeable risk. It is illogical to argue that the claimant exposed himself and that he was unable to run from the robbers, when required to run. Private security service providers must always ensure that at least some of their guards are licensed to possess firearms, that they are trained on use of firearms, and that they have these firearms when assigned dangerous missions such as the claimant was assigned, on April 10, 2014, in the middle of the night. It is a wrong approach for the respondents to submit that it is an occupational hazard that at some point a security guard will encounter armed robbers in line of duty, and that such encounter is not evidence of an employer's negligence. The correct approach would be for the respondents to introspect, ask what measures they took when the incident occurred, and before its occurrence, aware as they are, of the risk their security guards face, in view of rampant violent robberies in the country.
26. The court is satisfied that the respondents were negligent, and that the claimant sustained bodily injuries, as a result of that negligence.
27. Details of special damages are supported by documents exhibited by the claimant. The respondents submit that the documents are inadmissible under section 19 of the *Stamp Duty Act*, because the documents are not stamped. This objection is raised in the closing submissions, rather than on trial. The Court of Appeal, in *Diamond Trust Bank Kenya Limited v Jaswinder Singh Enterprises* CA NO 285/98 [ur], held that before rejecting documents under the *Stamp Duties Act*, the court ought to give an opportunity to the party producing it to pay the stamp duty and the penalty. The respondents ought to have raised this objection during trial, and the court would have then given the claimant opportunity to redress. There was no objection and beside, the documents were admitted by consent of the parties, save for one medical report, whose production the respondents objected to.
28. The prayer of special damages is allowed at Kshs 20,665 as pleaded.
29. The claimant has established that he suffered injuries as pleaded at paragraph 9 [i] [ii] and [iii] of his statement of claim.
30. At paragraph 23 of their submissions, the respondents propose to pay to the claimant Kshs 500,000 in general damages for pain and suffering, relying on 3 decisions – *Julie Akoth Onyango v Daniel Otieno & another* [2020] e-KLR; *Justine Nyamweya Ochoki & another v Francis Ndurya Thoya & another* [2020] e-KLR; and *Tirus Mburu Chege & another v JKN & another* [2018] e-KLR.
31. The claimant submits that his injuries warrant a higher award of Kshs 1,500,000. He relies on Civil Appeal No. 284 of 2001, *Catholic Diocese of Kisumu v Tete* [2004] e-KLR, where the claimant suffered moderate to severe concussion, cut wound and soft tissue injuries, and was awarded Kshs 1,300,000 in general damages. He relies also on *PN Mashruu Limited v Omar Mwakoro Makenge* [2018] e-KLR where the claimant suffered fracture of the temporal bone with haematoma, head injury to the frontal parietal bone with brain oedema, and was awarded Kshs 1,200, in general damages.
32. The conclusion of Dr Thinwa at Kenyatta National Hospital is that the claimant suffered fracture anterior wall of maxillary antra with hemosinus, nasal cavity haematomas and left orbital radiopaque foreign body. The claimant was assessed to have suffered 6% permanent disability.
33. His injuries compare well with the those sustained by the claimants in decisions provided by both parties. Assessment of damages is discretionary to the trier of facts, and should not be inordinately high



or low, as to represent an entirely erroneous estimate. Guided by the decisions above, the court assesses and awards general damages for pain and suffering to the claimant, at Kshs 1,400,000.

34. Costs to the claimant.

35. Interest allowed at court rate, from the date of Judgment till payment is made in full.

In Sum, it is Ordered:

a. The respondents shall pay to the claimant special damages at Kshs 20,665 and general damages for pain and suffering at Kshs 1,400,000 – total Kshs 1,420,665.

b. Costs to the claimant.

c. Interest allowed at court rates, from the date of Judgment, till payment is made in full.

Dated, signed and released to the Parties electronically, at Nairobi, under the Ministry of Health and Judiciary Covid-19 Guidelines, this 31st day of January 2023.

James Rika

Judge

